

# THE USE OF EXPERT TESTIMONY IN MOLD LITIGATION<sup>†</sup>

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## I.

### INTRODUCTION

It has been said that claims for damage related to indoor molds threaten to become the “next asbestos” in the United States. Schools and office buildings have been evacuated, and homes have been burned to the ground intentionally because of “mold contamination.” Feature stories and special reports on the topic regularly appear on local and national news programs, and Congress is considering mold legislation that proposes a national mold insurance program requiring governmental agencies to establish acceptable levels of mold in the indoor environment. In short, “mold hysteria” is in full bloom. In the year 2001, for example, insurers reportedly spent \$1.3 billion on mold claims.<sup>[1]</sup> Over 44,000 mold claims were presented in Texas alone during 2000 and 2001, according to the Insurance Information Institute.<sup>[2]</sup> As a result, some major insurance companies have chosen not to issue new homeowners policies in Texas and California.

Named defendants in mold litigation can include owners and managers of commercial buildings, home inspectors, real estate sellers, manufacturers of building products, architects, engineers, contractors and subcontractors, including roofers, plumbers, and landscapers. This list is far from exhaustive but it demonstrates the breadth of potential liability. Furthermore, when commercial buildings, schools, or large multi-unit residential buildings become contaminated with mold, defendants face potential class actions brought by business employees, students, apartment tenants, and condominium owners. School districts also have been subject to mold litigation; when children are exposed to mold, emotions and potential verdicts can run particularly high. Indeed, the impact of mold has grown far and wide.

As a result of the complexity of mold claims and the numerous theories of liability, experts are required in nearly every mold case. The kinds of experts needed are typical of any construction defect case, for the most part. What is different about mold cases is the need for expert testimony suggesting that exposure to airborne indoor mold causes serious bodily injury. However, there is a substantial question about whether such testimony can withstand the scrutiny of *Daubert*<sup>[3]</sup> or other state standards governing admissibility of expert testimony. Mounting an effective defense to a mold claim requires a firm grasp on these concepts and the tactical ability to exclude such “junk science” when appropriate.

This article will discuss some basic scientific principles associated with bodily injury claims involving mold exposure. It also will survey cases addressing the admissibility of expert testimony in the mold context.

## II.

### DEFINING MOLD

Mold is a microscopic member of the fungi kingdom. It lacks chlorophyll and therefore must feed on plant and animal matter. Mold comprises twenty-five percent of Earth's biomass and has been in existence for millions of years. Over 1000 different species of mold have been found in United States homes.<sup>[4]</sup> The most common indoor molds are identified as *Cladosporium*, *Penicillium*, *Alternaria*, and *Aspergillus*.<sup>[5]</sup> *Stachybotrys chartarum* is a less common species, though it is not rare. Mold exists in virtually every environment and can be detected year round, both indoors and outdoors. As a result, there is no practical way to eliminate all molds in the indoor environment.<sup>[6]</sup>

Mold serves many useful purposes, among them decomposing organic material. It exists in rotting logs, fallen leaves, and compost piles. It also is used in common medicine, such as penicillin. Furthermore, many different foods contain mold, including cheese.

Mold requires three things that humans also require to survive: food, temperature, and water. The “food” on which mold thrives includes standard cellulose-based building materials such as drywall, wall covering, ceiling tile, and carpet backing. Mold and human beings also share a preferred temperature range. Therefore, the human indoor environment is perfect for mold growth, provided the element of water is also present. Water from a leaky roof or pipe, or even excess humidity, is sufficient to sustain mold growth in the indoor environment.

## III.

### MOLD DAMAGE CLAIMS

Mold claims typically arise after a water loss at a home or commercial building. Mold growth is often discovered after the suspected water source is “repaired.” Such growth is frequent under these circumstances if the water source has not been fully repaired or there remain other water sources not previously identified. Mold growth may occur as well if the response to the water intrusion was untimely; the United States E.P.A. recommends that wet building materials be cleaned and dried within twenty-four to forty-eight hours to prevent mold.<sup>[7]</sup> Further, when substantial mold growth is discovered, “killing” the mold with bleach may not be

effective on some surfaces. Instead, where porous materials are involved, it may be necessary to remove the affected property, including drywall and flooring. Thus, mold remediation can be quite costly.

#### IV.

##### ORIGIN OF MOLD CASES

Commentators have advanced numerous theories to explain the advent of mold claims. One theory is based upon the “energy crisis” experienced during the 1970’s in the United States. Purportedly, the desire for greater efficiency in energy consumption led to the construction of more energy-efficient buildings. These structures often were fitted with sealed windows and required central heating and air-conditioning systems to closely regulate the amount of outdoor air that was permitted to circulate within the buildings. Additionally, the building materials used in these structures included Gypsum wallboard, stucco, and wall coverings, all of which potentially trapped air and moisture inside while also serving as a tasty menu for mold. Another theory notes that certain sections of the United States have experienced tremendous population growth. Theoretically, this led to an increased demand for energy-efficient homes and buildings that were constructed quickly and cost-effectively. This population growth occurred in warmer climates where water penetration of the building envelope was not previously a major concern and created an environment that was perfect for growing mold.

Another potential genesis for the mold claim explosion could be activities of the United States Centers for Disease Control (CDC). The CDC initially published a study in 1994 linking the presence of indoor mold to a condition known as acute pulmonary hemorrhage in infants.<sup>[8]</sup> Sixteen of the infants eventually died from the condition. Upon further consideration, the CDC retracted the findings, citing deficiencies in the study. However, plaintiffs and their counsel seized the initial CDC findings together with the relevant testimony of some experts in order to assert that indoor exposure to mold caused serious bodily injury.

Another theory advanced by the author and others is that the increased volume of mold claims occurred in response to two jury verdicts obtained against insurers in 2000 and 2001. The cases were tried in California and Texas and involved alleged “bad faith” claims handling. The verdicts issued in the amounts of \$18 million and \$32 million, respectively. This view may be the more cynical and in retrospect, the more accurate. These two cases focused the media spotlight on mold and resulted in television news stories at national and local levels. Feature articles also have appeared in *The Wall Street Journal*, *Forbes*, *The New York Times*, and *USA Today*. Hollywood even provided mold with a boost when Ed McMahon, sidekick to former late-night talk show host Johnny Carson, and Erin Brockovich, the world’s most famous paralegal, brought mold claims.

#### V.

##### EXPERTS IN MOLD LITIGATION

Many of the same experts used in traditional construction defect litigation are employed in mold cases. For example, complaints can allege either that faulty workmanship or a defective building component permitted water penetration of the building envelope and the consequent development of mold. In those cases, defendants may need to retain experts from the same disciplines used in traditional construction defect cases to defend their products or construction methods.

However, mold cases differ from traditional construction defect cases in several important respects. In mold cases, expert analysis can be required to locate, identify, and quantify mold inside the building. Industrial hygienists often fill this role in mold cases. Mycologists who specialize in mold also may be required. In the event a bodily injury claim is made, defendants may need to retain a physician, toxicologist, immunologist, or pulmonologist to determine the health effects of the mold. If defendants suspect malingering or other underlying psychological illness, psychiatrists and neuropsychiatrists may be required to fully assess the plaintiff's condition.

For the most part, techniques for litigating expert witness issues in mold cases are no different from those implemented in other litigation. However, there is one particularly important issue on which defendants have focused their efforts since the resolution of this issue often is dispositive and could impact the long-term future of mold litigation. That issue concerns the admissibility of expert testimony that exposure to airborne mold in the indoor home or office environment may cause serious bodily injury, including neurocognitive deficits. This issue is the flashpoint for the future of mold litigation.

## VI.

### CAUSATION OF BODILY INJURY

One of the most controversial aspects of mold claims is the extent to which exposure to airborne mold in the indoor environment may cause serious bodily injury. Specifically identifying the scientific proof regarding bodily injury from exposure to mold is beyond the scope of this article. However, there are certain general issues that demand familiarity on the part of defendants and their insurers in mold cases. Mold spreads and reproduces through the release of microscopic seed-like spores into the air.<sup>[9]</sup> Once located in an area providing the requisite food, temperature, and water, these spores can germinate and produce millions of new spores.

Mold also can produce mycotoxins, some of which can be harmful to susceptible individuals in certain concentrations. The amount and type of mycotoxins produced is dependent on a “complex and poorly understood interaction of factors that probably include nutrition, growth substrate, moisture, temperature, maturity of the fungal colony, and competition from other microorganisms.”<sup>[10]</sup> Therefore, it is important to note that the mere presence of a toxigenic species of mold does not mean that mycotoxins are also present.<sup>[11]</sup>

Some people are sensitive to molds, and exposure to high levels of mold may cause nasal stuffiness, eye irritation, and wheezing.<sup>[12]</sup> Since individuals hold different sensitivities to mold, “[i]t is not possible to specify a safe or a dangerous level for mold at this time.”<sup>[13]</sup> According to the 1993 “Indoor Allergens” report by the Institute of Medicine, airborne fungal allergens are associated most often with allergic diseases, such as allergic rhinitis/conjunctivitis, allergic asthma, and hypersensitivity pneumonitis.<sup>[14]</sup> In a 2000 report entitled, “Clearing the Air: Asthma and Indoor Air Exposures,” the Institute of Medicine concluded that evidence of an association between exposure to mold and exacerbation of asthma exists, but there is insufficient information to conclude that mold exposure can cause the onset of asthma.<sup>[15]</sup>

As for more serious injuries, science at this juncture seems unable to support the assertion that exposure to airborne mold in the home or office setting can cause such conditions. For example, plaintiffs have alleged that their exposure to airborne mold in a home or apartment caused neurological deficits. Experts have even testified to this effect, as discussed in greater detail below. However, as Dr. Redd of the CDC-NEH testified before Congress on July 18, 2002, “[l]inkages between indoor airborne exposures to mold and other health effects, such as bleeding from the lung, or memory loss, have not yet been scientifically substantiated.”<sup>[16]</sup>

Scientific support causally linking other serious health conditions with exposure to mold in the indoor home and work environment is also lacking. For example, although two mold-produced toxins have been classified as human carcinogens, their association with liver and kidney tumors arose from chronic ingestion of contaminated food, not airborne exposure.<sup>[17]</sup> Even a relatively minor condition, such as a respiratory infection due to inhalation of *Aspergillus*, principally involves those who have been immunocompromised, according to authoritative documentation.<sup>[18]</sup> With regard to infection, indoor mold exposure is “generally not a specific risk factor in the etiology of mycoses” except under certain circumstances, according to the American College of Occupational and Environmental Medicine (ACOEM).<sup>[19]</sup> Serious fungal infections primarily are restricted to patients who are severely immunocompromised, such as cancer patients receiving intense chemotherapy.<sup>[20]</sup>

People live with mold and even the mycotoxins they produce on a daily basis. Normally, they coexist without any negative health consequence at all. The most recognized mycotoxin is a carcinogen known as aflatoxin. It is produced by *Aspergillus*.<sup>[21]</sup> However, aflatoxin is regulated nationally and is permitted to exist at certain levels in peanut butter, peanuts, and wheat.<sup>[22]</sup>

Several experts and organizations have reached conclusions that are consistent with Dr. Redd's testimony before Congress in 2002. The ACOEM recently found that "current scientific evidence does not support the proposition that human health has been adversely affected by inhaled mycotoxins in the home, school, or office environments."<sup>[23]</sup> The Texas Medical Association, in its September 2002 report, also concluded that "[a]dverse health effects from inhalation of *Stachybotrys* spores in water-damaged buildings is not supported by available peer-reviewed reports in medical literature."<sup>[24]</sup>

The American Industrial Hygiene Association published another well-known study.<sup>[25]</sup> The National Institute of Occupational Safety and Health reviewed articles published in the scientific community related to mycotoxins. The study concluded that there was inadequate evidence to support a causal relationship between illness among building occupants and exposure to airborne mycotoxins.

Even more recently, two mycologists with the University Hospitals of Cleveland and Case Western Reserve concluded that "there is no sound evidence linking mycotoxin exposure to serious or permanent lung injury" and "no evidence for neurological compromise caused by indoor mold exposure."<sup>[26]</sup> The study also found that "most traditional sampling methods (e.g., exposed agar plates) are incapable of adequately measuring either airborne or sedentary organisms." The report cited 465 references to support the conclusions.<sup>[27]</sup>

Even the relatively minor symptoms allegedly associated with mold, such as flu-like symptoms, upper respiratory infections, asthma, allergic rhinitis, and hypersensitivity pneumonitis, can be caused or aggravated by other common indoor products like dust, dust mites, and cockroach fragments and excreta.<sup>[28]</sup> Therefore, the presence of mold growth does not mean that a hazardous airborne exposure has occurred.<sup>[29]</sup> Dr. Howard M. Sandler cautions that, in conducting an allergic mold assessment, the species of mold found in the building should match the results of skin allergy tests for that specific mold, and these should be present in the air at significant levels.

There is also some question regarding the validity of sampling that determines the presence of mycotoxins. Frequently, air sampling is undertaken when mold is suspected of causing health problems. The samples are examined in a laboratory setting to determine the type and concentration of airborne mold spores and mycotoxins. One expert, Dr. Ronald Gots, notes that there is "insufficient evidence with which one can evaluate the relevance of mycotoxins produced in a laboratory culture setting as predictors of those that might be present in indoor ambient air."<sup>[30]</sup> As a result, one



cannot assume that mycotoxins detected in laboratory cultures would be the same as those potentially present in spores or on particulates in ambient air, simply because a particular mold has been detected. We currently have no reliable analytical methods with which ambient air samples can be evaluated for the presence of mycotoxins.<sup>[31]</sup>

Therefore, according to Dr. Gots, air sampling results are not necessarily conclusive of the presence of mycotoxins in the indoor environment.

In summary, it appears that certain high levels of airborne toxigenic mold in an indoor environment may cause adverse health effects in susceptible individuals. The extent of these health effects is dependent on numerous variables, all of which must be considered when evaluating a mold case. However, at least to this point, science does not support the claims of certain plaintiffs that mold causes more serious injuries, including cognitive deficits.

## VII.

### Bodily Injury Cases

As noted above, there is no present scientific basis on which to link exposure to airborne mold in the indoor environment with serious bodily injury. Nevertheless, certain courts have permitted expert testimony that mold exposure can cause not only asthma and respiratory ailments, but permanent cognitive deficits as well.

#### *A. Allison v. Fire Insurance Exchange*

The plaintiffs, Melinda Ballard, Ron Allison, and their son Reese Allison (collectively “Ballard”), lived in a twenty-two room mansion in Dripping Springs, Texas.<sup>[32]</sup> From 1996 through December 1998, the Ballard home experienced several plumbing leaks.<sup>[33]</sup> Ballard filed a claim with her insurer in December 1998.

The insurer inspected Ballard’s residence on numerous occasions thereafter, but disagreed with Ballard over the nature and extent of repair work to be conducted.<sup>[34]</sup> Around this same time, according to Ballard, the plaintiffs became ill. Ballard and her son Reese developed respiratory ailments, and Ron Allison began having difficulty with his memory and concentration.<sup>[35]</sup>

In April 1999, Ballard hired Bill Holder, one of the founders of an air quality company, who brought along two other experts, including a scientist from the Texas Tech University Department of Immunology and Microbiology.<sup>[36]</sup> Holder, whose work was limited to commercial buildings and schools, agreed to work for Ballard after Ballard discovered that Holder was working on another home -- the Texas Governor’s Mansion

occupied by then Governor George W. Bush and his family.<sup>[37]</sup> Holder and the scientists began testing Ballard's residence for mold, and in early April discovered the presence of *Stachybotrys Atra* ("Stachybotrys").

On April 23, 1999, after Holder and the scientists conducted additional tests, Ballard was informed that the *Stachybotrys* was airborne, and that the family should leave the residence immediately. Ballard left everything behind and moved out of the house. After various inspections and further tests, additional leaks were discovered in other areas of the residence, including the upstairs shower, the water equipment storage area, the air conditioning closet, and the garage.

Ballard filed a complaint against the homeowners' liability insurer in Travis County, Texas, on May 5, 1999. Ballard's complaint alleged breach of contract, deceptive trade practices, breach of the duty of good faith and fair dealing in the claims handling process, and negligence.<sup>[38]</sup> The matter proceeded to jury trial on May 7, 2001.<sup>[39]</sup>

Ron Allison claimed to suffer from memory loss and concentration problems, alleging that these problems forced him to resign his job as an investment advisor.<sup>[40]</sup> Dr. Eckhardt Johanning diagnosed Ron Allison with toxic encephalopathy (which is brain damage).<sup>[41]</sup> Dr. Johanning and Dr. Wayne Gordon were prepared to testify that Ron's health problems resulted from his exposure to mold.<sup>[42]</sup>

Initially, the trial judge intended to admit the doctors' expert testimony.<sup>[43]</sup> However, the judge reversed his decision, citing his function as a gatekeeper of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>[44]</sup> For such testimony to be admissible, *Daubert* requires that the expert opinion be relevant and based on scientifically valid reasoning or methodology.<sup>[45]</sup> In determining whether an opinion is scientifically valid, the judge must consider the extent to which the theory can be tested, whether the theory has been subjected to peer review or publication, whether the relevant scientific community generally accepts the theory as valid, whether there is a known or potential rate of error, and whether relevant governing standards exist.<sup>[46]</sup> While some states still use the *Frye* standard for determining admissibility,<sup>[47]</sup> based on whether the techniques and procedures used are generally accepted within the scientific community, Texas has adopted the more rigorous *Daubert* standard.<sup>[48]</sup>

Additionally, the Texas Supreme Court ruled in 1997 that when a party attempts to recover for bodily injury resulting from exposure to toxins, expert testimony is only admissible if the expert can demonstrate general



and specific causation.<sup>[49]</sup> In determining whether general causation is demonstrated, the court must consider multiple factors. First, epidemiological studies used must show that the injury was caused more likely than not by the toxin.<sup>[50]</sup> This requires a comparative analysis of the number of injuries occurring in exposed and control groups, a ninety-five percent confidence level, and a doubling of the relative risk.<sup>[51]</sup> The court also would consider the strength of association, the temporal relationship, and whether or not the subjects of the study were similarly situated to the plaintiff in terms of their exposure to the same toxins at similar levels.<sup>[52]</sup> A party also must demonstrate specific causation, meaning that the substance at issue caused the specific injuries alleged.<sup>[53]</sup> With mold, the court specifically should consider whether mycotoxins were present, whether the plaintiff was exposed to the mycotoxins, and whether the dose and duration were sufficient to cause injury.<sup>[54]</sup>

In *Ballard*, the trial judge determined that the expert testimony Ballard planned to use was inadmissible.<sup>[55]</sup> Ballard's experts were not able to demonstrate general causation since very few epidemiological studies were available on the subject, and the studies that were available did not meet the ninety-five percent confidence level.<sup>[56]</sup> Furthermore, Ballard's experts could not establish the specific causation requirement because the experts could not demonstrate a sufficient link between Ron Allison's exposure and his brain damage.<sup>[57]</sup>

After a four-week trial and two days of deliberation, the jury returned a verdict in excess of \$32 million.<sup>[58]</sup> The jury awarded Ballard \$11,227,525 for replacement of the residence, remediation of the residence, replacement of the contents of the residence, past and future additional living expenses, costs of the appraisal process, and mental anguish. The jury also awarded Ballard \$12,000,000 in punitive damages and \$8,891,000 in attorneys' fees.<sup>[59]</sup> The personal injury claim of Ronald Allison was not presented to the jury.

On December 19, 2002, the Texas Court of Appeals found that the evidence in the record was both legally and factually insufficient to support the jury's findings of unconscionability or fraud on the part of the insurer. The court further found insufficient evidence that the insurer failed to appoint a competent, independent appraiser or that the appraisal decision resulted from fraud, accident, or mistake. However, the court did affirm the actual damages in part, awarding \$4,006,320.72 in addition to prejudgment and postjudgment interest. The court also concluded that there was no evidence to support the jury's finding that the insurer "knowingly" breached its duty of good faith and fair dealing toward Ballard. Because a finding of "knowing violation" was required to uphold punitive and mental anguish damages, the court reversed the jury's awards for these damages

and rendered judgment that Ballard take nothing for punitive and mental anguish damages.

Ballard's husband, Ronald Allison, filed a separate appeal, contending that the district court erred in excluding Allison's causation experts and in granting the no-evidence motion for partial summary judgment on Allison's personal injury claims. However, the appeals court affirmed the lower court's rulings on that appeal as well.

The appeals court specifically held that the criteria for epidemiological studies applied since such studies were a "crucial underpinning" for the opinions of Allison's causation experts.<sup>[60]</sup> The court noted that one of the experts, Dr. Gordon, had testified that it was "premature" to calculate a confidence interval for the results of the study or to calculate a risk factor. Dr. Gordon also could not say whether the techniques used were generally accepted. Thus the epidemiological study did not meet the ninety-five percent confidence interval or the requirement that exposure to the substance more than double the risk of injury.<sup>[61]</sup> Further, the testimony was not based on a reliable foundation, and any opinion drawn from that unreliable data likewise was unreliable. The court did not address the sufficiency of the evidence with respect to specific causation.<sup>[62]</sup>

While the defendant may have prevailed in *Ballard*, the battle continues in other jurisdictions over "junk science" and whether mold can cause serious bodily injury. The Supreme Courts of Nebraska and Delaware have held that such testimony is permissible.

*B. Mondelli v. Kendel Homes Corp.*

The Mondellis sued for defective construction of their home, which allegedly led to mold growth.<sup>[63]</sup> Barbara Mondelli suffered several asthma attacks that required hospitalization. The trial court excluded testimony by the plaintiff's expert linking the mold exposure to the asthma attacks since there are no standards in the scientific community concerning an acceptable level of mold in a house. The plaintiff's expert, Dr. Adi Pour, was a toxicologist for the Nebraska Department of Health and Human Services. The Supreme Court of Nebraska found that Dr. Pour's testimony satisfied the *Frye* standard for admissibility of expert testimony and should have been submitted to the jury. Dr. Pour's opinions were based on laboratory findings of higher mold spore concentrations inside the house when compared to concentrations outside the house. Also, the species of mold found inside the house were different from those that existed outside. According to the court, a list of publications submitted by Dr. Pour demonstrated that the scientific community has "generally accepted the principle that a connection exists between the presence of mold and health."<sup>[64]</sup>

*C. New Haverford Partnership v. Stroot*

The plaintiffs in *New Haverford* were tenants of an apartment building that had experienced problems with water leaks and mold growth.<sup>[65]</sup> One of the plaintiffs, Elizabeth Stroot, was a 33-year-old who had suffered from allergies and asthma since childhood. She suffered seven asthma attacks requiring trips to the emergency room and spent nine days in the hospital as an in-patient during the twenty-one months she lived in the apartment building. In addition to the respiratory difficulties, a neuropsychologist diagnosed Stroot as having suffered significant permanent “cognitive impairment in the areas of attention, concentration, memory and executive functions” caused by exposure to mold.<sup>[66]</sup> Dr. Johanning, the same expert who appeared in *Ballard*, was permitted to testify that the plaintiff sustained permanent cognitive deficits from her exposure to mold. The Delaware Supreme Court subsequently affirmed a jury verdict of \$1 million in favor of Stroot. The court observed that Dr. Johanning had properly reached a differential diagnosis by scientifically excluding other possible causes for Stroot’s condition. Dr. Johanning relied upon blood sampling, data from the apartment building concerning the presence of mold gathered two years after the plaintiff’s exposure, a medical history, and a detailed questionnaire. The court determined that the foundation for Dr. Johanning’s opinion “need not be established with the precision of a laboratory experiment.”<sup>[67]</sup>

#### *D. Dick v. Pacific Heights Townhouses*

In *Dick v. Pacific Heights Townhouses*,<sup>[68]</sup> a California appellate court, in an unpublished decision, affirmed dismissal of a mold suit where the plaintiff alleged that toxic mold made her apartment uninhabitable and caused her to suffer flu-like symptoms. The court determined that the plaintiff had failed to show that the mold was a substantial factor in causing her health problems. Despite a three-week bench trial with several expert witnesses, the plaintiff could not establish a causal link between her alleged injuries and the mold discovered in her townhouse garage. At trial, the tenant offered evidence from two medical doctors and an environmental consultant to substantiate her claims. The two doctors testified that the tenant’s symptoms were consistent with mold toxicity. The environmental consultant testified that water intrusion caused the growth of toxic and other dangerous molds on the interior wallboard of her garage. For the defense, a microbiologist testified that there were no controls in place when the slime samples were taken from the apartment and that fecal coliform levels found in the samples were not dangerous. On appeal, the tenant argued that the trial court committed prejudicial error by failing to adjust the substantial factor test to accommodate the difficulty of proving a mold-exposure injury. The court found no supporting authority for the plaintiff’s argument, however. Finding the tenant’s description of the trial court’s error “rather murky,” the appeals court noted that the trial court

admitted “volumes of expert testimony” and could properly find, as trier of fact, that there was insufficient evidence to link the mold and toxins to plaintiff’s alleged injuries.<sup>[69]</sup>

*E. Davis v. Henry Phipps Plaza South Associates*

In *Davis*, the plaintiffs had intended to present expert testimony that toxic mold in an apartment building was the cause of brain damage and cognitive impairment.<sup>[70]</sup> While the defendants conceded the admissibility of expert testimony that mold caused the plaintiffs’ pulmonary and respiratory injuries, the defendants argued that the proposed testimony of plaintiffs’ experts, linking mold exposure to brain damage and/or cognitive impairment, was inadmissible under *Frye*.<sup>[71]</sup> The trial judge held a *Frye* hearing to determine whether or not the scientific community generally accepted the proposed testimony and later excluded the expert testimony for lack of general acceptance that exposure to mold could cause brain damage and cognitive dysfunction.

*F. Nicholson v. Metro Property Management, Inc.*

In *Nicholson v. Metro Property Management, Inc.*,<sup>[72]</sup> a Maryland jury awarded \$154,200 for property damage and \$65,000 for personal injuries sustained by a five-year-old boy as a result of his exposure to mold.<sup>[73]</sup> The boy’s pre-existing liver condition was allegedly exacerbated and eventually required surgery. Robert Rubin, a Baltimore toxicologist, and Margaret Flowers, a pediatrician, testified on behalf of the plaintiffs. One of the physicians, who had previously treated the boy’s liver condition, apparently opined that there was no connection between mold and the damages asserted in the action. The Circuit Court of Baltimore County has since denied the defendant’s motion for remittitur and a new trial.

*G. Mazza v. Schurtz*

In *Mazza v. Schurtz*,<sup>[74]</sup> California jury in Sacramento County awarded more than \$2.7 million in damages to a family for injuries caused by exposure to mold in their apartment.<sup>[75]</sup> The plaintiffs, including two parents and their son, alleged that they were repeatedly hospitalized for personal injuries caused by mold, and two allergists testified on their behalf. The defendant argued that the testimony should not have been permitted since one of the experts had not interviewed or examined the plaintiffs and had reviewed none of the medical records that preceded the plaintiffs’ tenancy in the subject apartment.<sup>[76]</sup> According to the testimony of another physician, two of the plaintiffs had been treated previously for asthma. The trial court subsequently denied defendants’ motion for new trial.<sup>[77]</sup>

H. *Centex-Rooney Construction Co. v. Martin County*

Finally, in *Centex-Rooney Construction Co. v. Martin County*, Martin County (“County”) sued Centex-Rooney (“Centex”) and Centex’s sureties for mold growth and construction defects in the county courthouse and constitutional building (the “buildings”).<sup>[78]</sup> Centex served as the construction manager for the structures, which were built in 1988. Centex and its sureties were jointly and severally liable under a performance bond issued to the County.

Centex argued that the County’s expert testimony regarding possible health hazards due to mold growth in the buildings should have been inadmissible under *Frye*. The Florida Court of Appeals upheld the trial court’s decision to admit the testimony, however. That court ruled that the scientific principles underlying the opinions of the County’s experts were generally accepted in the scientific community. The two experts had cited “numerous publications accepted in the scientific community recognizing the link between exposure to the highly unusual toxigenic molds and adverse health effects.”<sup>[79]</sup> The court therefore found that the County had adequately demonstrated that the underlying principles at issue had been sufficiently tested and accepted.

VIII.

CONCLUSION

Defendants and their counsel are waging an aggressive battle against plaintiffs’ experts who attempt to use “junk science” to connect mold exposure with serious bodily injury. There appears to be no scientific basis to causally link mold and more serious health conditions, including neurological impairments. The National Academy of Sciences reportedly is conducting a study of medical literature regarding this issue, and its report for the government is due in 2003.<sup>[80]</sup> California’s Toxic Mold Protection Act requires a study to determine whether permissive exposure limits (PELs) can be set for mold.<sup>[81]</sup> However, there is no funding for the study. Nevertheless, a group of volunteers, including at least one prominent physician, met in northern California to discuss the issue in October 2002.<sup>[82]</sup> The results of these studies could materially alter future mold litigation.

Insurance analysts for Standard & Poor’s have offered that mold claims peaked in 2001. Thus, at least to this point, it appears that the mold “crisis” may be only temporary. Proper handling of expert issues, particularly in bodily injury mold cases, is crucial in the effort to ensure that mold does not become the “next asbestos.”

ENDNOTES

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† Submitted by the author on behalf of the FDCC Toxic Tort and Environmental Law Section.

[1] *Insurance Companies Just Say “No” to Covering Mold*, WALL ST. J., Aug. 8, 2002, at D1, D3.

[2] *Eyes of California’s Mold Watchers Are Upon Texas*, SACRAMENTO BUS. J., July 8, 2002.

[3] *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

[4] *Mold: A Growing Problem*, Joint Hearing Before the Subcomm. on Oversight and Investigations and the Subcomm. on Housing and Community Opportunity of the Comm. on Fin. Servs., 107th Cong., 2d Sess. 8 (2002) (Statement of Stephen Redd, M.D., Chief, Air Pollution and Respiratory Health Branch, National Center for Environmental Health, Centers for Disease Control and Prevention) [hereinafter Redd testimony].

[5] *Questions and Answers on Stachybotrys chartarum and other molds*, Centers for Disease Control and Prevention, National Center for Environmental Health (CDC-NEH), at <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm>.

[6] *Mold Resources: Introduction to Molds*, U.S. Environmental Protection Agency (U.S. E.P.A.), at <http://www.epa.gov/iaq/molds/moldresources.html>.

[7] *Indoor Air Quality – Mold*, United States Environmental Protection Agency, <http://www.epa.gov/iaq/molds/moldresources.htm#Introduction%20to%20Molds>.

[8] United States Centers for Disease Control, *Case Definition for Acute Idiopathic Pulmonary Hemorrhage in Infants*, <http://www.cdc.gov/nceh/airpollution/mold/AIPHicasedef.htm>.

[9] *Mold Allergy*, National Institute of Health, National Institute of Allergy and Infectious Diseases, at <http://www.niaid.nih.gov/publications/allergens/mold.htm>.

[10] Bryan D. Hardin, Ph.D. et al., *Adverse Human Health Effects Associated with Molds in the Indoor Environment*, American College of Occupational and Environmental Medicine (2002) [hereinafter ACOEM statement].

[11] *Id.*

[12] *Questions and Answers on Stachybotrys chartarum and other molds*, Centers for Disease Control and Prevention, National Center for Environmental Health (CDC-NEH), at <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm>.



- [13] Redd testimony, *supra* note 4, at 9.
- [14] *Id.* at 60.
- [15] *Id.*
- [16] *Id.* at 67.
- [17] *Id.* at 59.
- [18] *Id.*
- [19] ACOEM statement, *supra* note 10.
- [20] *Id.*
- [21] *Mold: A Growing Problem, Joint Hearing Before the Subcomm. on Oversight and Investigations and the Subcomm. on Housing and Community Opportunity of the Comm. on Fin. Servs., 107th Cong., 2d Sess. 70 (2002) (Statement of Howard M. Sandler, M.D.) [hereinafter Sandler testimony].*
- [22] *Id.*
- [23] ACOEM statement, *supra* note 10.
- [24] O. Edwin McClusky, M.D., *Black Mold and Human Illness*, Report of Council On Scientific Affairs, CSA Report 1-I-02, *available at* <http://www.texmed.org>.
- [25] Elena H. Page & Douglas B. Trout, *The Role of Stachybotrys Mycotoxins in Building-Related Illness*, 62 AM. INDUS. HYGIENE ASS'N J. 644 (Sept.-Oct. 2001).
- [26] Duncan M. Kuhn & Mahmoud A. Ghannoum, *Indoor Mold, Toxigenic Fungi, and Stachybotrys Chartarum: Infectious Disease Perspective*, 16 CLIN. MICROBIOL REV. 144 (JAN 2003).
- [27] Funding for the study was provided by the CNA Insurance Corp.
- [28] Sandler testimony, *supra* note 21, at 71.
- [29] *Id.* at 72.
- [30] Ronald E. Gots, M.D., Ph.D., *Correcting Misapplication of Science in Personal Injury Claims: A Periodic Report with Supporting Citations*, Vol. 1, No. 6 (Nov. 5, 2002).

- [31] *Id.*
- [32] Lisa Belkin, *Haunted by Mold*, N.Y. TIMES MAG., Aug. 12, 2001, at 28.
- [33] Allison v. Fire Ins. Exch., 98 S.W.3d 227, 234 (Tex. App. 2002).
- [34] *Id.*
- [35] Susan Spencer, *This Mold House: Measures Families Take to Fix Mold Problems in Their Homes*, 48 Hours CBS News Transcripts, Sept. 5, 2001, Burrelle's Information Services.
- [36] Belkin, *supra* note 32, at 28.
- [37] *Id.*
- [38] Allison, 98 S.W.3d at 236.
- [39] *Id.* at 237.
- [40] Belkin, *supra* note 32, at 28.
- [41] Spencer, *supra* note 35, at 7-8.
- [42] Allison, 98 S.W.3d at 239.
- [43] Pretrial Mot. Hr'g Rep. R. at 47-48, *Ballard v. Fire Ins. Exch.* (Tex. Dist. Ct. May 7, 2001) (No. 99-05252).
- [44] 509 U.S. 579 (1993).
- [45] *Id.* at 589.
- [46] *Id.* at 593-95.
- [47] A number of states still apply the Frye standard, including New York, Florida, Illinois and Nebraska.
- [48] Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998).
- [49] Merrell Dow Pharms. v. Havner, 953 S.W.2d 706 (Tex. 1997) ("*Havner*").
- [50] *Id.* at 715.
- [51] *Id.* at 718, 723-24.

- [52] *Id.* at 720.
- [53] *Id.* at 714.
- [54] See Ronald E. Gots, M.D., Ph.D., *Mold and Mold Toxins: The Newest Toxic Tort*, J. CONTROVERSIAL MED. CLAIMS, Vol. 8, No. 1, Feb. 2001.
- [55] Pretrial Mot. Hr'g, *supra* note 43, at 47-48.
- [56] *Id.* at 55.
- [57] *Id.* at 56.
- [58] *Allison*, 98 S.W.3d at 237.
- [59] *Id.*
- [60] *Id.* at 239.
- [61] *Id.* at 239-40.
- [62] *Id.* at 240.
- [63] *Mondelli v. Kendel Homes Corp.*, 631 N.W.2d 846 (Neb. 2001).
- [64] *Id.* at 856.
- [65] *New Haverford P'ship v. Stroot*, 772 A.2d 792 (Del. 2001).
- [66] *Id.* at 797.
- [67] *Id.* at 800.
- [68] 2002 Cal.App.Unpub.LEXIS 8957.
- [69] *Id.* at \*15.
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- [71] *Id.* at 15.
- [72] No. 03-C-00-005586 (Md. Cir., Baltimore Co. November 9, 2001).

- [73] *Maryland Jury Awards \$219,000 for Mold Injury, Damage Claims*, MEALEY'S LITIG. REP.: MOLD, Vol. 2, Issue 1, Jan. 11, 2002.
- [74] No. 00A S04795 (Cal. Super. Ct., Sacramento Co. November 8, 2001).
- [75] *California Jury Awards Family \$2.7 Million in Injury Case*, MEALEY'S LITIG. REP.: MOLD, Vol. 1, Issue 12, Dec. 3, 2001.
- [76] Mem. in Supp. of Def.'s Mot. for New Trial at 8, *Mazza v. Schurtz*, (Cal. Super. Ct. Co. of Sacramento) (No. 00AS04795).
- [77] *California Judge Rejects Challenges to \$2.7 Million Mold Personal Injury Case*, MEALEY'S LITIG. REP.: MOLD, Vol. 2, Issue 2, Feb. 4, 2002.
- [78] *Centex-Rooney Constr. Co. v. Martin County*, 706 So. 2d 20, 23 (Fla. Dist. Ct. App. 1997).
- [79] *Id.* at 26.
- [80] Jill Freudenwald, *Mold in the Home: How it Affects Realtors*, National Association of Realtors, <http://www.realtor.org/GAPublic.nsf/pages/moldpapers?OpenDocument>.
- [81] State of California Department of Health Services, SB 732 (*Toxic Mold Protection Act of 2001*) Implementation Update, March 2003, <http://www.cal-iaq.org/SB732update.htm>.
- [82] Statement is based upon a conversation of the author with a physician scheduled to attend the meeting.

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